

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

QUESTION PRESENTED

The question is whether the restoration of appellant on June 26, 1958 after a successful appeal was a bona fide compliance with the restoration order of the Commission so as to conform with the policy laid down in Federal Personnel Manual Letter 752-2 and make the December 5, 1958 separation a genuine reduction in force.

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,327

NIMER S. WAHBY, *Appellant*

v.

STEPHEN AILES, ET AL., *Appellees*

Appeal from the United States District Court for the
District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal docketed January 13, 1964, under the provisions of Title 28, Sec. 1291 of the United States Code, from an order of the United States District Court for the District of Columbia entered November 7, 1963, granting summary judgment to the defendants, appellees herein, and denying summary judgment to the plaintiff, appellant herein.

PRELIMINARY STATEMENT

This case is here for the second time. Appellant in the first appeal, No. 16,486, called the Court's attention to Federal Personnel Manual Letter 752-2 issued by the Civil Service Commission after its decision in appellant's case and argued that it should control the decision on that appeal. Appellees moved to remand to the Civil Service Commission "for further study of appellant's reduction in force" on representations of the General Counsel of the Civil Service Commission that there was nothing in the decisions of the Commission "reflecting that the matter of a bona fide restoration was considered" and that the Commission wished to re-examine its decision in the light of "its newly promulgated policy" as expressed in FPM Letter 752-2. After briefs had been filed and the case argued, this Court remanded the case

"to the District Court to retain jurisdiction but with the direction that the matter be referred to the Civil Service Commission for determining the applicability, if any, of a newly promulgated policy contained in Federal Personnel Manual Letter 752-2 to the circumstances surrounding the reduction in force of appellant on November 4, 1958; that the Civil Service Commission be directed to review the matter promptly and report the results of such review to the District Court
* * *".

The Appeals Examining Office sustained the original action of the Agency on December 4, 1962 and the Board of Appeals and Review concurred on June 18, 1963. The District Court granted summary judgment to the defendants-appellees and denied a similar motion filed by plaintiff-appellant. This appeal is from that order entered November 7, 1963.

STATEMENT OF THE CASE

Appellant, a career employee of the Army Map Service was separated from Job No. 4423 under a reduction in force on January 17, 1958 (J.A. 23)* but on appeal, the Civil Service Commission, on June 12, 1958, held that the separation violated Sec. 20.5 of the Retention Preference Regulation and instructed the Map Service to restore him, effective January 17, 1958, to Job No. 4421 (then encumbered by Mr. Peacock, a career conditional employee) (J.A. 27), or to another position of like grade, seniority or tenure (J.A. 25).

Between June 12 and June 26, 1958, Mr. Barsky, Chief of the Section in which appellant and Mr. Peacock worked, told Mr. Peacock that appellant had won his appeal and was coming back but that the Map Service would have appellant and Mr. Peacock occupy the same job until Mr. Peacock could be converted to career status in October of 1958, at which time they would abolish appellant's "half of the job". (J.A. 50)** On June 26, 1958, the Map Service cancelled appellant's separation but did not recreate Job No. 4423 (J.A. 27). On the same day, appellant was first restored retroactively to the non-existent Job No. 4423, and then reassigned to Job No. 4421 (J.A. 27-28), already encumbered by Mr. Peacock. Mr. Peacock was neither separated nor reassigned to a new job, but on June 30, 1958 was detailed for a total of 90 days to Job No. 4414 in another Section of the Branch (J.A. 29).

In the middle of September, 1958, Mr. Shepard, Chief of the Branch, told Mr. Peacock that the Map Service would abolish appellant's job as soon as Mr. Peacock had gained status and return Mr. Peacock to the job he had

* Unless otherwise noted, Joint Appendix citations are to the Joint Appendix in the first appeal, No. 16,486.

** Mr. Peacock's testimony was by oral deposition and is uncontradicted in the record.

occupied at the time of appellant's restoration, Job No. 4421. (J.A. 51). On September 21, 1958, Mr. Peacock was reassigned from Job No. 4421 to a newly created Job No. 5263 in the U.S.S.R. Section (J.A. 31). On October 10, 1958, Mr. Peacock was given a conversion to career appointment (J.A. 32).

On November 4, 1958, appellant received a second notice which stated that due to an "insufficient work load", appellant's position would be abolished and he would be separated by reduction in force. (J.A. 33). Appellant was separated effective December 5, 1958 (J.A. 37), and his appeal of this separation action was denied by the Board of Appeals and Review of the Civil Service Commission on June 2, 1959 (J.A. 39-41). In March of 1959, Mr. Barsky returned Mr. Peacock to his Section (J.A. 51) and, on December 3, 1959, officially reassigned him to his old job (J.A. 51), where he remained until he resigned effective January 15, 1960.

Appellant filed suit for reinstatement in the United States District Court for the District of Columbia. On May 10, 1961, Judge McGuire entered an order granting appellees' motion for summary judgment and denying appellant's similar motion. Appellant noted an appeal to this Court on June 7, 1961. Proceedings after that were as outlined in the Preliminary Statement herein.

STATUTES, RULES AND REGULATIONS INVOLVED

Statute:

Veterans Preference Act of 1944 as amended.

In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service and efficiency ratings:

* * * [Act of June 27, 1944, c. 287, 58 Stat. 390, U.S.C., Title 5 § 861 (1958)]

Civil Service Regulations:

Sec. 20.5

Actions. (a) *In general.* Employees who cannot be retained in their positions because of a reduction in force will be changed to positions that will last as long as three (3) months, separated or furloughed.

(b) *Employees in positions in the competitive service.*

(1) No employee may be separated, furloughed for more than thirty (30) days, or reduced in pay or grade in a reduction in force while a competing employee with lower retention standing (and without retention priority based on retention right) is retained in the same competitive level.

(2) No employee in any subgroup of tenure group I or II who is willing to accept a reasonable change in position may be separated, furloughed for more than thirty (30) days, or subjected to greater reduction in pay than necessary under such reasonable change in position, (i) if he is qualified for a position which will last as long as three (3) months in another competitive level in his present competitive area in which an employee with lower subgroup standing is retained, or (ii) if he is qualified to go back to a position which will last as long as three (3) months from which he was promoted (or to an essentially identical position) in his present competitive area in which an employee with lower retention standing (and without retention priority based on a statutory right) is retained.

Federal Personnel Manual:

Chapter X-1-1:

A position is not vacant, and therefore cannot be filled by another person while its incumbent is still carried on the rolls of the agency.

STATEMENT OF POINT

The Agency deliberately circumvented the June 12, 1958 restoration order of the Commission in appellant's case, denied him his full rights on restoration under the Commission's policy and then separated him illegally on December 5, 1958.

SUMMARY OF ARGUMENT

The "restoration" action by the Map Service violated the spirit and the letter of the Civil Service Commission's policy as laid down in Federal Personnel Manual Letter 752-2 and was, therefore, not a bona fide compliance with the Commission's order. The violation of the policy created the surplus of personnel and the separation was not therefore a genuine reduction-in-force action. Reversal of the lower court is required because of the bad faith of the agency and the illegality of the December 5, 1958 separation.

ARGUMENT

I. The "restoration" of the "successful appellant" on June 26, 1958 from a separation by reduction in force violated the spirit of FPM Letter 752-2 and was not a bona fide compliance with the Commission's order.

A. The FPM Letter said that the restoration of a successful appellant separated by reduction in force "must be a bona fide action."

B. The Agency plot, as revealed to Mr. Peacock to circumvent the order was carried into effect.

1. Mr. Barsky, supervisor of Mr. Peacock and appellant, told Mr. Peacock that appellant had won his appeal and was coming back but that he and Mr. Peacock would occupy the same job until Mr. Peacock could be converted to career status in October, at which time they would abolish appellant's "half of the job".

2. Mr. Shepard, Chief of the Branch, later told Mr. Peacock that they would abolish appellant's job as soon as Mr. Peacock had gained status and return Mr. Peacock to the job he had occupied at the time appellant was restored.

3. Mr. Barsky and Mr. Shepard carried out their promises to Mr. Peacock to the letter and unless this Court acts to prevent it, they will have effectively circumvented the June 26, 1958 restoration order of the Commission with the active help of the Commission. They put appellant and Mr. Peacock into the same job and kept them there from June 26 to September 21, 1958 although they sought to conceal this situation by detailing Mr. Peacock to the job of a vacationing incumbent from June 30 to September 21, 1958, at which time they transferred him to a newly created job in another Branch where they kept him until he had acquired career status on October 10, 1958. On November 4, 1958, appellant received his reduction in force notice and his job was abolished. In March of 1959, Mr. Peacock was brought back to Mr. Barsky's section and, after the Board of Appeals and Review had denied appellant's appeal, Mr. Peacock was officially reassigned to his old job and remained there until he resigned on January 15, 1960.

C. Neither the Appeals Examining Office nor the Board of Appeals and Review of the Civil Service Commission so much as mentioned Mr. Peacock's testimony in considering the case on the remand, even though this testimony under oath and subjected to cross-examination stands uncontradicted in the record. Mr. Peacock's testimony alone shows bad faith on the part of the Agency.

II. The Agency violated the rules laid down in the "newly promulgated policy" announced in FPM Letter 752-2.

A. The FPM Letter said in part that in working out the problem of how to make a position available for a successful appellant, the agencies can avoid or minimize these problems

- by not officially filling the position of a separated employee whose appeal is pending, or by filling it through detail until the appeal is resolved; or
- by returning the employee to some vacant position equal in grade and pay to that from which he was separated provided this can be done under the terms of the restoration order. (Emphasis supplied.)

B. Strict compliance with the wording of the FPM Letter would have required the Agency to do several things which it did not do.

1. When appellant was separated on January 17, 1958, the Agency should have kept the position from which he was separated (No. 4423) open or filled it by detail until his appeal was resolved. The Agency did neither, instead it abolished his job immediately.
2. After the Commission's June 12, 1958 restoration order, the Agency should have returned appellant to the job from which he had been separated (but it had been abolished and was not recreated) or to "some vacant position" equal in grade and pay to that from which he was separated. The Agency did neither; instead it returned him to Job No. 4421, not a vacant job but one encumbered by Mr. Peacock who was then detailed to a job encumbered by a vacationing employee. The decisions of the Civil Service Commission on remand ignore the "Vacant position" directive.

3. The Agency should have completed the reduction in force action. The FPM Letter said in part that in working out problems created by a successful appellant, the agencies

"Should keep in mind that an order for restoration of a successful appellant will serve as a basis *for completing all reduction in force actions* that may be necessary to make a suitable position available for the appellant * * * (Emphasis supplied.)

The FPM Letter referred to the case upon which the letter was based and said in part that:

"the Commission found that the other employee's later acquisition of career status did not and could not vitiate the appellant's entitlement to displace him *in a reduction in force that should have been completed before the other employee acquired such status.*" (Emphasis supplied.)

The FPM Letter said in part that:

"the Commission's letter of decision recommended that the agency cancel the appellant's separation and that he be restored retroactively. This letter also indicated that unless some suitable reassignment could be offered the other employee or the appellant, *the other employee must be demoted or separated, as appropriate* * * *." (Emphasis supplied.)

4. Strict compliance with this wording of the FPM Letter would have required the Agency to complete the reduction in force action when appellant was restored by separating Mr. Peacock "to make a suitable position available for the appellant". But the Agency did not do this; instead it postponed the reduction in force action until November 4, 1958. This was over eleven months after the reduction in force had been started on December 10, 1957. It was

five and one-half months after appellant had been restored to duty on June 26, 1958, but it was less than one month after Mr. Peacock had been converted to career status. The Appeals Examining Office ignored and the Board of Appeals and Review avoided the question of whether the reduction in force should have been completed by separating Mr. Peacock.

III. Appellant's separation on December 5, 1958 was not a genuine reduction in force and was effected in violation of the law and applicable regulations.

Section 20.2 of the Civil Service Regulations states:

"A 'reduction in force' is the release of an employee from a competitive level by means of separation from the rolls, furlough for more than thirty (30) days, reassignment involving displacement, or change to lower grade; when such actions are caused by lack of work, shortage of funds, reorganization, or exercise of regulatory reassignment or reemployment rights. * * * (22 F.R. 3409, May 15, 1957)."

The November 4, 1958 notice to appellant of a coming reduction in force said that it was due to an "insufficient work load". One person, appellant, was separated as a result of this action. Then Mr. Peacock was brought back into the Section from which appellant was separated. He went back to doing the work he had been doing before he was detailed. The Civil Service Commission had said that appellant was capable of doing that work. The reduction in force was due to the retention of Mr. Peacock on June 26, 1958 when a reduction in force was in process and his reassignment to a new position on September 21, 1958 not to "lack of work, shortage of funds, reorganization, or exercise of regulatory reassignment or reemployment rights."

This Court in *Ritter v. Strauss*, 104 App. D.C. 301, 261 F.2d 767 (1958), held that where the surplus of employees on which the separation was based had been artificially created by making a new appointment at a time when a reduction in force was in contemplation, and not by any one of the factors listed in the regulation, the separation was not a genuine reduction in force. Here the surplus of employees was created by keeping an employee who should have been separated and was not the result of any of the reasons listed in the Civil Service Regulation. This "Reduction in Force" was as lacking in genuineness as the one in the *Ritter* case and the action should be condemned here as it was in *Ritter v. Strauss*.

IV. The decision of the Appeals Examining Office ignores facts.

The decision of the Appeals Examining Office pays no attention to Mr. Peacock's testimony. It passes off the manipulations of Mr. Peacock as having "no bearing on the issues of this case". It fixes its sights on the conditions existing at the time of the second reduction in force, and concludes from its analysis of these conditions that the "restoration action was a bona fide compliance with the order of the Commission."

V. The decision of the Board of Appeals and Review ignores the main issue.

The decision of the Board of Appeals and Review simply concurred in the decision of the Appeals Examining Office. It ignored the question of good faith. It ignored Mr. Peacock's testimony. It said that the FPM Letter was not a "newly promulgated policy" and chided appellant's counsel for using the phrase. It implied that bona fides must take second place to administrative discretion. The Board admits that it looked only at the paper work of the Agency and did not look into the bona fides of the restoration action. It noted that Mr. Wahby made no

protest at the time of his restoration. It said that since Mr. Peacock did not complain it did not and will not look into the manipulations by which Mr. Peacock was kept in the Agency.

VI. Conclusion.

The judgment of the lower Court must be reversed and judgment in favor of appellant must be granted, with a decree reinstating him to his position.

Respectfully submitted,

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JOINT APPENDIX

Relevant Docket Entries

- September 8, 1959—Complaint filed
- December 7, 1959—Answer filed
- January 5, 1960—Defendant filed Motion for Summary Judgment
- April 15, 1960—Plaintiff's Opposition filed
- May 3, 1960—Order entered overruling defendant's motion
- February 1, 1961—Plaintiff filed motion for summary judgment
- April 3, 1961—Defendant filed cross motion
- April 24, 1961—Motions argued
- May 10, 1961—Order entered granting defendant's motion and denying plaintiff's motion
- June 5, 1961—Order of substitution entered
- June 7, 1961—Notice of appeal
- July 3, 1962—Order of U. S. Court of Appeals filed
- August 1, 1962—Order on Mandate
- August 6, 1963—Plaintiff filed Motion for Summary Judgment
- October 7, 1963—Defendants filed Motion for Summary Judgment
- November 7, 1963—Order entered granting defendant's motion and denying plaintiff's motion.
- December 4, 1963—Notice of Appeal.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2500-'59

NIMER S. WAHBY, 5950 Piney Branch Road, N. W.,
Washington, D. C., *Plaintiff*

v.

WILBUR M. BRUCKER, Secretary of the Army, Pentagon
Building, Washington, D. C.

ROGER W. JONES, BARBARA BATES GUNDERSON, FREDERICK J.
LAWTON, Members of the United States Civil Service
Commission, 7th and F Streets, N. W., Washington,
D. C., *Defendants*

Complaint for Declaratory Judgment and Mandatory Injunction Ordering Secretary of Army to Reinstate Plaintiff in His Position With Army Map Service and Ordering the Civil Service Commission to Find Plaintiff's Separation by Reduction in Force Illegal

(Filed September 8, 1959)

1. Jurisdiction of this Court is based upon 28 U.S.C. 1331, 1332, 2201 and 2202; 5 U.S.C. 22 and 1009 and Title 11 D.C. Code 1951 Edition.

2. Plaintiff is a citizen of the United States and a resident of the District of Columbia and at all times pertinent was employed as a Geographic Names Specialist, Army Map Service, Technical Services Division, Geographic Names Branch, Middle East-Africa Section.

3. Defendant, William M. Brucker, is sued in his capacity as Secretary of the Army and defendants Roger W. Jones, Barbara Bates Gunderson and Frederick J. Lawton are sued as members of the United States Civil Service Commission; all of whom officially reside in the District of Columbia.

4. On or about December 10, 1957, plaintiff received a Reduction in Force Notice from the Army Map Service,

based upon a claimed but fictitious "recent decrease in the authorized personnel strength of the Technical Services Division, Army Map Service". The notice stated that it was proposed to abolish the position then occupied by plaintiff: Job N. 4423 and further that "Inasmuch as there are no remaining positions in your competitive level occupied by persons in a lower retention group and subgroup xxx your separation by reduction in force will be effected at the close of business on 17 January 1958".

5. Plaintiff appealed the proposed action to the Civil Service Commission by a letter dated December 18, 1957 on the ground that the action was improper, arbitrary and capricious and the further ground that he was qualified for reassignment to Job No. 4421 then occupied by an incumbent with less retention points than plaintiff.

6. Plaintiff was separated from his position: Job No. 4423, by Reduction in Force by Notification of Personnel Action dated January 23, 1958, effective January 17, 1958.

7. The Appeals Examining Office of the Civil Service Commission upheld plaintiff's appeal by letter dated March 21, 1958 on the stated ground that separation of plaintiff "by reduction in force was a violation of Section 20.5 of the Retention Preference Regulations and therefore improper" on the ground that plaintiff was qualified to hold Job No. 4421.

8. The action of the Appeals Examining Office was sustained by the Board of Appeals and Review of the Civil Service Commission by a letter dated June 12, 1958 which stated in part: "Mr. Wahby should be restored as of the effective date of his separation to the position numbered 4421, or xxx be reassigned as of the date mentioned to another position of like grade, seniority and tenure for which he is found fully qualified and to which he may be assigned without undue interruption to the work."

9. The reduction in force action of January 17, 1958 was cancelled by the Army Map Service by a Notification of Personnel Action dated June 26, 1958, effective January 17, 1958, and by a Notification of Personnel Action dated June 26, 1958, plaintiff was restored to his old position: Job No. 4423, and, on the same day, was reassigned to Job No. 4421, effective January 17, 1958. Neither the incumbent of Job No. 4421, whom plaintiff was to displace under the Commission's letter, nor any other employee with fewer retention points than plaintiff was separated following this action.

10. On June 30, 1958 a complete rewriting of job descriptions, fraudulently describing the duties to be performed in the positions, was initiated in Army Map Service. Following this, favored employees were assigned to the positions even though some were obviously not qualified to perform the duties allegedly assigned to the position. The purpose of this maneuver was to place plaintiff in a vulnerable position for a new attempt to eliminate him in a reduction in force program.

11. On or about November 4, 1958, plaintiff received another alleged Reduction in Force Notice from the Army Map Service, based this time upon a claimed but fictitious "insufficient work load to justify the retention of the present number of Geographic Names Specialists in the Middle East-Africa Section". The employee whom plaintiff was to have displaced as a result of the Commission's letter of June 12, 1958 was still on the rolls. The notice stated that it was proposed to abolish the position then occupied by plaintiff: Job No. 4421; that "responsibility for the areas in your position have been assigned to positions 5263 (encumbered by the man whom plaintiff was to have displaced as a result of the Commission's letter of June 12, 1958) and 5270" and that "Inasmuch as there are no remaining positions in your competitive level, occupied by persons in a lower retention group and subgroup

xxx your separation by reduction in force will be effected at the close of business on 5 December 1958".

12. By a letter dated November 10, 1958, plaintiff appealed the proposed action to the Civil Service Commission on the ground that the action was not a bona fide reduction in force; was arbitrary and capricious and used, contrary to the Rules and Regulations of the Civil Service Commission, as a means of firing him.

13. Plaintiff was illegally separated from his position: Job No. 4421 by an alleged Reduction in Force by Notification of Personnel Action dated December 8, 1958, effective December 5, 1958.

14. The Appeals Examining Office, despite their knowledge that plaintiff had superior retention rights over at least two employees who were being retained, denied plaintiff's appeal by letter dated December 22, 1958. Plaintiff appealed to the Board of Appeals and Review by letter dated December 30, 1958. The appeal was denied by the Board of Appeals and Review by letter dated June 2, 1959 on the erroneous ground that "an employee does not have a right of appeal to the Commission with respect to the classifications accorded positions other than his own, the qualifications of others for their positions nor the correctness of description of positions which do not affect his competitive level". The Commission, with utter disregard of its duties and of the rights of plaintiff, failed and refused to investigate and declare illegal and void the classification and placement actions taken which resulted in the elimination of plaintiff's position.

WHEREFORE, the premises considered, plaintiff prays:

1. That an order be entered herein declaring the December 5, 1958 separation from the Army Map Service to have been unwarranted and illegal on the ground that it was not the result of a bona fide reduction in force.

2. That a mandatory injunction issue directing the Secretary of the Army to take or cause to be taken appropriate action to reinstate and restore plaintiff to the position held by him on December 5, 1958.

3. That the said Order declare the December 22, 1958 and the December 30, 1958 denials of plaintiff's appeal by the Civil Service Commission to have been unwarranted and illegal because not in conformance to the law and the Regulations of the Commission.

4. That a mandatory injunction issue directing the Civil Service Commission to sustain plaintiff's November 10, 1958 appeal.

5. For such other and further relief as the Court may seem proper.

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Answer

(Filed December 7, 1959)

FIRST DEFENSE

The complaint fails to state a cause of action upon which relief may be granted plaintiff.

SECOND DEFENSE

Answering specifically the numbered paragraphs of the complaint, defendants aver as follows:

1. Denied.

2. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation that plaintiff is a citizen of the United States and a resident of the District of Columbia. Further answering, defendants deny the remaining allegations of paragraph 2 of the complaint, except insofar as it is admitted as follows: Personnel records at the Army Map Service reflect that plaintiff was born at Haifa, Palestine on February 22, 1922, that the last known address of plaintiff is 5950 Piney Branch Road, N. W., Washington 11, D. C., that plaintiff was appointed at the Army Map Service on February 26, 1951, as a Translator, GS-7, and was separated by Reduction in Force on December 5, 1958, and that at the time of such separation he was employed as a Geographic Names Specialist, GS-9, Job No. 4421, in the Middle East-Africa Section, Geographic Names Branch, Technical Services Division of the Army Map Service.

3. Admitted.

4. Defendants are not required to answer the allegations contained in paragraph 4 of the complaint since they are irrelevant and immaterial. But, insofar as an answer is required, such allegations are denied, except insofar as it is admitted as follows: A letter dated December 10, 1957, Subject: Reduction in Force, was delivered personally to

2. That a mandatory injunction issue directing the Secretary of the Army to take or cause to be taken appropriate action to reinstate and restore plaintiff to the position held by him on December 5, 1958.

3. That the said Order declare the December 22, 1958 and the December 30, 1958 denials of plaintiff's appeal by the Civil Service Commission to have been unwarranted and illegal because not in conformance to the law and the Regulations of the Commission.

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(Filed December 7, 1959)

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The complaint fails to state a cause of action upon which relief may be granted plaintiff.

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Answering specifically the numbered paragraphs of the complaint, defendants aver as follows:

1. Denied.

2. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation that plaintiff is a citizen of the United States and a resident of the District of Columbia. Further answering, defendants deny the remaining allegations of paragraph 2 of the complaint, except insofar as it is admitted as follows: Personnel records at the Army Map Service reflect that plaintiff was born at Haifa, Palestine on February 22, 1922, that the last known address of plaintiff is 5950 Piney Branch Road, N. W., Washington 11, D. C., that plaintiff was appointed at the Army Map Service on February 26, 1951, as a Translator, GS-7, and was separated by Reduction in Force on December 5, 1958, and that at the time of such separation he was employed as a Geographic Names Specialist, GS-9, Job No. 4421, in the Middle East-Africa Section, Geographic Names Branch, Technical Services Division of the Army Map Service.

3. Admitted.

4. Defendants are not required to answer the allegations contained in paragraph 4 of the complaint since they are irrelevant and immaterial. But, insofar as an answer is required, such allegations are denied, except insofar as it is admitted as follows: A letter dated December 10, 1957, Subject: Reduction in Force, was delivered personally to

plaintiff and receipted by him on December 11, 1957; such letter must be read in its entirety for a proper understanding of its import. In brief, this letter advised plaintiff that his forthcoming separation by reduction in force would become effective at the close of business on January 17, 1958, that such separation was being effected as a result of a decrease in the authorized personnel strength of the Technical Services Division, and that there were no remaining positions in plaintiff's competitive level occupied by persons in a lower retention group and subgroup. The reason for the reduction in force was based upon planned gradual decreases in the personnel strength authorizations of the Technical Services Division and its Geographic Names Branch, as reflected in part by the following data:

Date	Total Authorization for Technical Services Division	Sub-Authorization for Geographic Names Branch
January 15, 1957	462	70
June 30, 1957	451	68
August 1, 1957	449	68
September 30, 1957	439	66
November 29, 1957	429	64
June 3, 1958	433*	65*
July 9, 1958	425	63
September 15, 1958	421	62
August 1, 1959	407	59

* Four temporary authorizations for students for summer.

As a result of such decreases, the cancellation of various positions in all segments of the Division was required. Consequently, the regrouping of work and areas of responsibility in the Geographic Names Branch was necessary in order to retain specified functional capabilities to support known future requirements. The decision to cancel Job No. 4423 was made for the reasons that such posi-

tion involved an area where mapping plans required minimum effort and far less effort than previously required, and that the cancellation of such position would cause the least disruption to the agency's programs and functions of all positions considered.

5. Defendants are not required to answer the allegations contained in paragraph 5 of the complaint for the reason that they are irrelevant and immaterial. But, insofar as an answer is required, it is admitted only that plaintiff appealed the proposed separation action to the Civil Service Commission by a letter dated December 18, 1957, which letter speaks for itself and must be considered in its entirety.

6, 7 and 8. Defendants are not required to answer the allegations contained in paragraphs 6, 7 and 8 of the complaint since they are irrelevant and immaterial. But, insofar as an answer is required, such allegations are admitted.

9. Defendants are not required to answer the allegations contained in paragraph 9 of the complaint since they are irrelevant and immaterial. But, insofar as an answer is required, it is admitted only as follows: A cancellation of the reduction in force action was issued on June 26, 1958, voiding the original reduction in force action. Plaintiff was then reassigned from Job No. 4423 to Job No. 4421 by Notification of Personnel Action dated June 26, 1958, and effective January 17, 1958. No displacement action was taken nor was any such action directed by the Appeals Examining Office or the Board of Appeals and Review. Mr. Harold Peacock was also an incumbent of Job No. 4421 at the time plaintiff was returned to duty on June 26, 1958. Mr. Peacock was detailed to perform duties in another area (the USSR Section) beginning June 30, 1958, consistent with earlier planning for changes based upon work requirements, and to fully utilize his capabilities.

10. Denied, except insofar as it is admitted as follows: As stated in paragraph 9 above, Mr. Harold Peacock was detailed on June 30, 1958, to perform duties in another area (Western Europe-Western Hemisphere Section). As partly evident from paragraph 4 above, this action was consistent with earlier plans. Positive steps were taken soon after 30 June 1958, to establish a new job in the USSR Section of the Geographic Names Branch. Mr. Peacock was ultimately reassigned from Job No. 4421 to this new position on September 21, 1958. It is believed the foregoing is the action referred to by the plaintiff. There was no fraudulent description of duties made nor was an assignment of a person made without proper qualifications. The new job in this instance was established because of actual work and production requirements. This is consistent with Army policy to establish jobs compatible with work requirements and as will fully utilize the capabilities of available personnel.

11. Denied, except insofar as it is admitted and further averred as follows: On November 4, 1958, a letter of Reduction in Force bearing the same date was delivered to plaintiff. This letter advised that plaintiff was to be separated at the close of business December 5, 1958. The reason given in the letter for the reduction in force is proper and correct and not fictitious as alleged in the complaint by the plaintiff. The reasons given are related to work and production requirements and the management decision to abolish this particular job relies upon supervisory judgment of such requirements. To have continued plaintiff in his job would have been uneconomical and wasteful of the manpower allotment available to this function. Plaintiff would have been productively employed for only a portion of his total time and this on low priority work, and he could not have been used in other areas due to the limitations of his own qualifications. Due to the lack of work in his own job and in order to keep plaintiff

occupied, he was detailed to the Manuscript Branch of the Technical Services Division for the period November 13, 1958, through December 5, 1958. No displacement action was necessary to return plaintiff to duty from the earlier reduction in force which was deemed improper by the Civil Service Commission. Therefore, the allegation that "The employee whom plaintiff was to have displaced as a result of the Commission's letter of June 12, 1958, was still on the rolls" is irrelevant and immaterial. Assuming that "the employee" referred to is Mr. Harold Peacock, he was and still is on the rolls of the Army Map Service and serving in Job No. 5263, to which he was re-assigned on September 21, 1958. Work requirements previously contained in Job No. 4421 had diminished to such an extent that they were readily included as contingent duties in new jobs which were established (Jobs Numbered 5263 and 5270). Mr. Peacock was in a lower retention group than plaintiff on the occasion of the first reduction in force action (which was cancelled); however, Mr. Peacock acquired Career Status by virtue of a Notification of Personnel action issued and effective October 10, 1958, showing "Conversion to Career Appointment." This had the effect of placing Mr. Peacock in a higher retention group (beginning on that date) than plaintiff. Based upon the foregoing, the question of retention group and sub-group between Mr. Peacock and plaintiff is irrelevant and immaterial.

12. Admitted.

13. Denied, except insofar as it is admitted and averred that plaintiff was properly and lawfully separated in a bona fide reduction in force from his position (Job No. 4421) effective December 5, 1958.

14. Denied, except insofar as it is admitted that the Appeals Examining Office of the Civil Service Commission denied plaintiff's appeal by letter dated December 22,

1958, and that plaintiff's subsequent appeal to the Board of Appeals and Review of the Civil Service Commission by letter dated November 30, 1958, was denied by the Board in its letter dated June 2, 1959. It is further averred that the actions of the Civil Service Commission with respect to plaintiff's separation on December 5, 1958, were proper and lawful in every material respect.

/s/ OLIVER GASCH
Oliver Gasch
United States Attorney

/s/ EDWARD P. TROXELL
Edward P. Troxell, *Principal*
Assistant United States
Attorney

/s/ JOHN F. DOYLE
John F. Doyle
Assistant United States
Attorney

/s/ HAROLD D. RHYNEDANCE, JR.
Harold D. Rhynedance, Jr.
Assistant United States
Attorney

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON 25, D. C.

In Reply Please Refer To
BAR: SJW:lj

June 12, 1958

Mr. B. D. Hull
Civilian Personnel Officer
Army Map Service
Washington 25, D. C.

Dear Mr. Hull:

This is in further reference to your letter of April 1, 1958, appealing the decision of the Appeals Examining Office in connection with the reduction-in-force action affecting Nimer S. Wahby, former Geographic Names Specialist, GS-301-9, who served as a sub-group I-B employee with 6 retention credits in the position from which he was separated as the result of a reduction-in-force notice of December 10, 1957, effective January 17, 1958.

The Board of Appeals and Review has considered all of the evidence in the file, including Mr. Wahby's comments on your letter (a copy of which was furnished him for comment) and the original file concerning the establishment of requirements for the positions of Geographic Names Specialist. The Board fails to find evidence which would warrant sustaining your contention that Mr. Wahby does not meet the minimum qualifications for Geographic Names Specialist, GS-301-9. The analysis made by the Appeals Examining Office appears comprehensive and accurate and the Board agrees with the recommendation included in the decision of that office that Mr. Wahby should be restored as of the effective date of his separation to the position numbered 4421, or that he be reassigned as of the date mentioned to another position of like grade, seniority, and tenure for which he is found fully qualified and to

which he may be assigned without undue interruption to the work. Evidence of corrective action in this case should be in the form of duplicate copies of Form 50 showing the cancellation and reassignment which should be submitted to the Board of Appeals and Review, U. S. Civil Service Commission, Washington 25, D. C., Attention: Miss Ruth L. Boyd, Room 231, Main Building, within ten days of receipt of this letter.

For the Commissioners:

Sincerely yours,

JOHN E. BLANN, Chairman
Board of Appeals and Review

cc: Mr. Nimer S. Wahby
5950 Piney Branch Road, N. W.
Washington 11, D. C.

cc: Appeals Examining Office

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON 25, D. C.

In Reply Please Refer to
BAR:HJE:dc

June 2, 1959

Mr. Nimer S. Wahby
5950 Piney Branch Road, N. W.
Washington 11, D. C.

Dear Mr. Wahby:

The Board of Appeals and Review has completed a careful study of the record in the case of your appeal from the decision of the Commission's Appeals Examining Office that there was no violation of any of your rights under the Retention Preference Regulations in connection with the action of the Army Map Service, Washington, D. C., where-

by as an employee in the competitive-service position of Geographic Names Specialist GS-9 and in retention subgroup I-B with 7 retention credits you were separated from the rolls effective December 5, 1958, after notice which you received on November 4, 1958.

Your request for an oral hearing was not granted by the Board inasmuch as there is no indication in your written representations that the information of record essential to a proper adjudication of your appeal is not correct. "Position" as referred to in the Retention Preference Regulations means the duties, responsibilities, and qualification requirements represented by the position description with respect to which the employee is carried on the rolls and paid, that is, his official position. An employee does not have a right of appeal to the Commission with respect to the classifications accorded positions other than his own, the qualifications of others for their positions, nor the correctness of description of positions which do not affect his competitive level.

The record shows that the notification which you received was proper and adequate. As the record also shows that you were alone in your competitive level throughout the notice period and that your agency proposed to separate you from the rolls as a result of the abolishment of your position, the Board has found that you were properly reached for action by reduction in force.

As a tenure group I employee reached in a competitive-service position for action by reduction in force, you were entitled to a reasonable offer of position change in lieu of separation, i.e., a change within your competitive area to a competitive-service position for which you were qualified, which was expected to last at least three months, and which had the same representative rate as your position or which involved the least possible reduction in terms of representative rate; provided, that the employee in the

continuing position was in a lower retention subgroup than you, or if the continuing position was one through which you had been promoted in the competitive service the incumbent had lower retention standing than you. The representative rate for a position such as yours which is subject to the Classification Act is the fourth step of the grade, it is the prevailing rate for a position outside the Classification Act using a wage-board or similar wage-determining procedure, and for all other positions it is the rate designated by the agency as truly representative of the position. In the reduction in force your agency was not required to offer you a choice of positions, a promotion, a vacant position, or a position at another post of duty, although such actions were not prohibited.

You indicated to your agency that a GS-7 position was the lowest you were willing to accept in lieu of separation. The record shows that you had been promoted from a GS-7 position in the competitive service but that no position like or essentially identical to that position continued in your competitive area. A number of employees were retained in continuing positions in your competitive area whose subgroup standing was lower than yours and whose positions were within the representative-rate range of GS-7 through GS-9. However, their positions were Position Classifier, Training Instructor, Mathematician, Technologist, or others for which you were not qualified. Among these also were Geographic Names Specialist and Translator positions involving languages in which you did not have the requisite proficiency. The Board has therefore found that no position representing a reasonable offer which you were willing to accept continued in your competitive area.

In view of the findings above that you were properly reached for action by reduction in force, that you received proper and adequate notification, and that there was no continuing position in your competitive area representing

a reasonable offer which you were willing to accept, the Board has determined that there was no violation of your rights in connection with your separation effective December 5, 1958. Accordingly, the previous decision is affirmed by the Board.

For the Commissioners:

Sincerely yours,

JOHN E. BLANN

John E. Blann, Chairman

Board of Appeals and Review

Affidavit of Nimer S. Wahby

Nimer S. Wahby, being first duly sworn according to law, deposes and says:

I am the plaintiff in the above-captioned matter.

I was first employed by the Army Map Service on February 26, 1951, by Mr. Greenacre, who had told me that the appointment would be at a grade six level.

The first day I came to work with AMS I had an argument with Mr. F. C. Shepard, who was Mr. Greenacre's assistant. Mr. Shepard wanted me to accept employment as a grade five, one grade less than the grade which I had been promised. I refused to accept the lower grade; and the grade six went through. Mr. Shepard resented that and showed it.

He and I never did get along well after that. It seemed to me that he went out of his way to harrass me. This continued for eight years and then in late November of 1957, an incident happened which I feel started the chain reaction which resulted in this suit. The 4:45 P.M. bell had rung and many employees, including myself, were hurrying towards the elevators. Mr. Shepard happened to

be going in the opposite direction. He saw me, singled me out of the whole group and grunted, "Huh, huh, huh!" to me as if he were addressing an animal. I simply said, "Huh, huh, huh to you!" He got red in the face but before he could say anything else I left for home.

The following morning Mr. Barsky came to me and said, "Mr. Shepard told me he saw you run in the corridor; he does not like that. He wants me to tell you that he is giving you an oral warning this time. Next time he sees you run, he will give you a written warning. After a couple of written warnings, he will fire you."

I said to Mr. Barsky, "First of all, I was not running in the corridor, but only hurrying. If Mr. Shepard wants to call what I was doing running, I certainly was not the only one doing that; the corridors were full of other employees doing the same thing. I know Mr. Shepard does not like me. He has been riding me all the time. I am sick and tired of him picking on me as he has done for the past eight years. You can go and tell him I am fed up with him. Let him do whatever he wants!" Mr. Barsky seemed astonished and asked, "Mr. Wahby, are you sure you want me to tell Mr. Shepard what you told me?" I answered, "Yes, go ahead, tell him!"

Mr. Barsky went immediately to Mr. Shepard and I could see, told him, what I had said. Mr. Shepard turned and glared at me. Two weeks later I received my first Reduction in Force notice that my job No. 4423 was being abolished.

The notice was dated December 10, 1957, effective January 17, 1958, and the reason given was "Recent Decrease in Authorized Personnel Strength".

I appealed this action to the Civil Service Commission, and its Appeals Examining Office on March 21, 1958, decided that I should have been allowed to displace Harold

Peacock in Job No. 4421. The Agency appealed this decision to the Board of Appeals and Review, which Board on June 12, 1958, denied the Appeal and ordered me restored "to the position numbered 4421". On June 26, 1958, the Agency cancelled the Reduction in Force; "restored" me to Job No. 4423; and "reassigned" me to Job No. 4421 which was still encumbered by Harold Peacock.

I reported for an interview with the Employee Utilization Representative, Mr. William P. Butler, on June 23, 1958. I was happy to have my job back and I was ready and willing to do my best to keep it and to forget and forgive. I said so to Mr. W. P. Butler who did not disguise his disappointment at seeing me back. He told me he could not understand how or why I had won my case against them. He questioned me about the defense, argumentations and proofs that I had submitted to the Civil Service Commission. He obviously could not understand where they could have miscalculated. I didn't want to anger him, so I simply said that as far as I was concerned, my case was a thing of the past and I would be very glad if they would forget about it, too, and let me start with a clean slate. Mr. Butler said, "It is not fair of the CSC to let you know what we write to them and not let us know what you write to them. Even though you have won your case, this thing is by no means over. There is a very good chance that the job you occupy will be closed out, too, and you will find yourself back where you started!" Mr. Butler certainly knew what he was talking about. On November 4, 1958, he handed me my second Reduction in Force notice. It was effective December 5, 1958, and the reason given this time was "an insufficient workload".

This time they were more careful and tried to make their case as airtight as they knew how. This they did by loading the job descriptions in such a manner as to deprive me of my retention preference rights and make it seem impossible for me to perform the faked duties in the job

descriptions of those who had less retention rights than myself.

Approximately one week before November 4, 1958, Mr. Barsky told me that due to an insufficient work load in my area, Job No. 4421 was being closed out. Mr. Butler confirmed this. I knew that the work load had not decreased. Mr. Butler said he had no proof of it. He referred me to Mr. Barsky. Mr. Barsky said he didn't know anything about it and had not been consulted. He later told me that he had talked to Mr. Shepard about it and the decision was based upon a classified yearly report.

Mr. Butler asked me if I was going to contest their RIF action and when I said yes, he asked me to tell him why I thought this RIF was unfair or illegal. To lure me on, and to get me to talk, he said, "If you can show me how and convince me that this RIF is not bona fide, I might reverse this decision and cancel the RIF action against you." I knew how keen he was to know how I had won my first case against them. I knew that if he found out ahead of time what my complaint to the CSC would include as arguments or proofs, they would do everything they could think of to be prepared for all eventualities. I answered Mr. Butler that I would present my side of the case to the CSC only.

My November 10, 1958 appeal to the Civil Service Commission, beginning on page 5, contained a charge that the Agency had gone "over all the job descriptions and doctored them in such a manner as to make it impossible for me to fit any of them." I charged that Mr. Shepard had deviated from the orthodox procedure by "tailoring the job description to fit the qualifications of a certain employee". I asked the Civil Service Commission to "protect my rights".

On November 13, 1958, I was detailed out of my office to the Manuscript Branch to do manual labor. On Novem-

ber 12, 1958, just a few minutes before quitting time, Mr. Barsky told me that I was transferred to the Manuscript Branch of the Technical Services Division beginning the next day. Mr. Barsky said that that was all he knew about it. On November 13, I reported for duty to the Chief, Mr. Peek, who told me that Technical Services Division Headquarters had asked him to ask for my transfer to his Branch. My new assignment was "stripping goldenrod" which was the most menial of their jobs. It consists of opening up big bundles of map negatives and separating the scrap paper frames and backs from the sticky tape on the map negatives. I did not receive my Standard Form 52 for the transfer until November 20.

The first job to which I had been assigned (No. 404) had required an excellent knowledge of French, English, Italian and German. Of these four languages, I only know French and English very well. Italian and German I know fairly well only.

My second job (No. 1922) required an excellent knowledge of Arabic, Berber, Lebanese and Syrian. Of these languages I know Arabic, Lebanese and Syrian very well, but not Berber.

My third job (No. 1919) required an excellent knowledge of French, Italian, German, Afrikaans, Bantu and Swahili. Only French I know very well. Italian and German I know fairly well and Afrikaans, Bantu and Swahili I do not know at all.

My fourth job (No. 3738) required an excellent knowledge of no less than thirty-two (32) languages and dialects. Only a couple of them do I know very well; the majority of the others I had not even heard of before.

My fifth job (No. 4423) required an excellent knowledge of Afrikaans, Bantu, Portugese, Umbundu, Khosa and Zulu. Of all these languages I do not know a single one very well and some not at all.

With complete disregard of the truth, Jobs No. 404 and 1919 which included the same countries, and therefore, by necessity, should have included the same language requirements, had different requirements. Job No. 404 required an excellent knowledge of French, English, Italian and German, while Job No. 1919 required an excellent knowledge of French, Italian, German, Afrikaans, Bantu and Swahili.

Again with complete disregard of the truth, Job No. 3738, which comprised twelve countries less than Job No. 404, had twenty-eight (28) more languages required in it than were required in Job No. 404.

These job descriptions so grossly exaggerate the quantity and quality of linguistic knowledge required that no human being could truthfully be able to perform the duties supposedly to be performed and therefore required of him.

It was my experience while with the Army Map Service that job descriptions were rigged to control who shall or shall not be able to qualify for employment in the Geographic Names Branch. Since no applicant for a job could possibly know all the languages required in the job description, no applicant would be allowed to pass the entrance exam, if after interview, Mr. Shepard decided he didn't want him in the branch. If the applicant was approved by Mr. Shepard, the languages requirements were disregarded and the applicant for the job was in.

Even though applicants were hired, they were often assigned to jobs for which they technically did not have all the necessary qualifications, but would occupy those jobs because Mr. F. C. Shepard wanted them to occupy them.

Mr. Shepard so rigged Miss R. Aivazian's job description as to make it seem impossible for me to prove that I can displace her without any undue interruption of work. During the eight years of my employment at the AMS, I

worked on Africa practically all the time. Either I was assigned to "Africa except predominantly Arabic speaking countries" (Job No. 404 and No. 1919) or I was assigned to the predominantly Arabic speaking countries of North Africa and the Middle East (No. 1922). Jobs (No. 404 and No. 1919) to which I was assigned comprise all of Africa except North Africa. Later on, my area was reduced (Job No. 3738) and, after a year or so, was further, and this time drastically, reduced (Job No. 4423). The job Miss Aivazian held at the time of my separation consisted of nothing more than part of the area I had previously held, a few of the countries that were previously assigned to me (Jobs No. 404 and 1919) and, subsequently, taken away from me to create a job for her.

To make it seem impossible for me to bump Miss Aivazian, however, Mr. Shepard abolished Miss Aivazian's job (No. 4424) and rewrote her job into Job No. 5095 which was rigged in such a manner as to make it seem impossible for me to bump her. The rigging was done by adding Iran, Afghanistan and Jammu-Kashmir, by altering the list of African countries in Job No. 4424, and by adding Armenian, Persian and Russian languages to a slightly altered list of African languages. This is deliberate fraud because:

1. Iran, Afghanistan and Jammu-Kashmir were already included in the primary area of responsibility of Mrs. Helen Bedrosian (Job No. 4416). Countries in the primary area of responsibility of one employee in the Middle-East Africa Section are not and have not to my knowledge ever been assigned to more than one employee at the same time.

2. Armenian and Russian are not used at all in any of the countries listed in her new job (No. 5095). They were added because Miss Aivazian is an Armenian herself, speaks the Armenian language and I do not. As far as

Russian is concerned, not only is it not spoken in any of those countries, but Miss Aivazian does not know Russian; nor do I.

A further attempt was made in inserting in her job the words, "In addition is responsible for performing translation of technical data from Persian, Russian, Armenian and French into English and English into Persian". This is another misstatement of fact because translations from Persian to English or from English to Persian, if any at all, are performed by Mrs. Helen Bedrosian who was born in Persia and whose primary area of responsibility includes Persia or Iran. As previously stated, none of the countries listed in Miss Aivazian's new job utilizes Armenian or Russian, so obviously there could be no such translations possible at all. There is a Russian Section, with the Geographic Names Branch, which does the technical or non-technical translations from Russian to English.

Signed

NIMER S. WAHBY

Subscribed and sworn to before me this 28th day of January, 1961

Signed MARILYN BERDANSKY

Notary Public

My commission expires March 31, 1964

Excerpts from Transcript of Testimony

2

HAROLD PEACOCK

was called for examination by counsel for the plaintiff, an dafter being sworn by the notary, was examined and testified as follows:

Examination by Mr. Scott:

Q. Let's get your full name first, Mr. Peacock. A. Harold Peacock.

Q. And your home address. A. 506 Chillum Road, Hyattsville, Maryland.

Q. Are you presently employed, Mr. Peacock? A. Yes.

Q. Where? A. The National Academy of Sciences.

Q. Was there a time when you were employed by the Army Map Service? A. Yes.

Q. When were you first employed there? A. October 10, 1955.

Q. When did you leave there? A. January 15, 1960.

Q. Do you know any Nimer S. Wahby? A. Yes.

.

8 Q. Did you have any talks with Mr. Barsky after you learned that Mr. Wahby had won his appeal and was coming back to work? A. Yes, Mr. Barsky told me—as I remember, it was two days before Mr. Wahby actually showed up—he said that Wahby had won his appeal, and I think, in fact, I am sure I asked him when he was coming back, and he says probably very soon, because since he would get his back pay, the Map Service would undoubtedly want him to start right into work.

Q. Did you talk at all to Mr. Barsky about what effect Mr. Wahby's return to Army Map Service would have on you? A. Yes. I don't remember now whether this was before Mr. Wahby actually came back or whether it was in the two days or so after I learned that he was coming back.

9 Q. What did Mr. Barsky say to you? A. He told me on the occasion of one such conversation at about

that time that he believed or he had an idea or it looked as if—some sort of prefixing expression like that—that they were going to have Wahby and me occupy the same job up until October, when I would have my status, and then abolish, you might say, the Wahby half of the job.

Q. Did he say anything about what would happen to Wahby then? A. Well, only inasmuch as abolishing his part presumably meant "Riffing" him again.

Q. Did you at any time between the first "Rif" of Mr. Wahby and his return to work ever talk to Mr. Barsky about the workload of the branch and whether there was work for you to do? A. Well, I don't think I ever brought up the question, is there enough for me, but Mr. Barsky did during the spring of 1958 give me sort of a slight briefing as to what work was in store for me, in other words, what the plan for me was during the ensuing months.

Q. Did that briefing include any assurance that there was work or that there wouldn't be work for you? A. Only inasmuch as the very fact that he showed me what he had planned for me to do was assurance that there would be work for me.

• • • • •

Q. After Mr. Wahby returned to the Map Service, did you have any conversations with Mr. Shepard about Mr. Wahby? A. Yes.

Q. Do you know when? A. Well, I had several, I think; in fact, I had several after that. The first one that I remember, and I think it was after Mr. Wahby got back, although conceivably it could have been during the day or so after I learned that he was coming back but hadn't come back, Mr. Shepard, who sat right behind my desk at the time, told me that if Mr. Wahby were to ask me what I had been doing the last few months, not to tell him but to refer him to Mr. Barsky.

• • • • •

12 Q. During the period of the 90-day detail did you ever have any discussions with Mr. Shepard about what was going to happen to you? A. Yes, just a few days before the term was up—

Q. Before what was up? A. Term, t-e-r-m. In other words, before the 90 days was up, I asked him what his plans were for me.

Q. What did he say? A. I don't remember his exact words. We had two or three conversations with him, but he gave me to understand that he was going to abolish Wahby's job and that he was going to keep me there.

Q. Keep you there? A. I mean, in the job that I had been having all along prior to me being placed under Mr. Trolle-steenstrup.

Q. Do I understand you mean that Mr. Shepard told you he was going to abolish Mr. Wahby's job and bring you back into the Middle East-Africa Section? A. Yes.

Q. Did he say when he was going to do it? A. No, I don't think so.

• • • • •
14 Q. Now, did the second "Rif" of Mr. Wahby come to your attention about the time it happened? A. Well, I told you, I had been told by Mr. Shepard before that he was going to do that.

• • • • •
16 Q. How long did you remain in the USSR Section? Am I saying that right, USSR Section? A. Yes, that is right. I was first there either the latter part of September or early October, 1958. In March of 1959, Mr. Barsky said that he had some work that he needed me to work on and he asked me if I would be willing to move for the time being back there long enough to get one or two jobs done. That was in March of '59.

17 Q. And what happened, did you move? A. Yes.

Q. That was back into Mr. Barsky's section, was it?
A. Yes, that is right.

Q. And that is— A. The Middle East-Africa Section.

Q. Where you had been before you were detailed out of it in June of '58; is that right? A. Yes, that is correct.

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Fpm Let. 752-2(1)

UNITED STATES CIVIL SERVICE COMMISSION
FEDERAL PERSONNEL MANUAL SYSTEM
LETTER

Washington 25, D. C.
PIP:TJD:ir
April 28, 1961

FPM LETTER No. 752-2

SUBJECT: Commission appeals decisions involving (1) restoration of successful appellants and (2) effect of Agency determinations made at time of appointment

Heads of Departments and Independent Establishments:

INTRODUCTION

Two recent appeals cases point up two principles which agencies should be aware of. These are:

1. The restoration of a successful appellant must give the employee all of the rights to which he is entitled under the Commission decision on which the restoration action is based.

2. The fact that the Commission does not review the reasons for a Part 9 action does not preclude it from determining whether an appellant in fact was given reasons for the action.

EFFECTIVE RESTORATION OF SUCCESSFUL APPELLANTS

The restoration of a successful appellant must give the employee all of the rights to which he is entitled in accordance with the provisions of the findings and recommendations of the Commission's decision on appeal. If it does not, the restoration action cannot serve as a basis for defeating these rights.

Inquiries: Regional Office or Bureau of Departmental Operations, Code 129 extension 5101

CSC Code: 752—Adverse actions

Distribution: FPM 61-35

This principle formed the basis for the Commission's decision on a recent reduction in force appeal. The appellant, a career employee in retention subgroup I-B, was reached for reduction in force and appealed on the grounds that the agency was in error in not reassigning him to a one-of-a-kind position occupied by a career-conditional employee in retention subgroup II-A. The Commission's Regional Office found the employee's contention sound and recommended that he be given reassignment rights to this position.

In the interim, the retention subgroup II-A employee had completed three years of service as a career-conditional appointee and attained career status, with the result that his retention rights became greater than the appellant's. In attempting to comply with the Region's decision, the agency established a new position identical to the employee's and restored the appellant to it.

Shortly thereafter, the appellant was again separated by reduction in force. In its final decision on his further appeal from this action, the Commission found that the other employee's later acquisition of career status did not and could not vitiate the appellant's entitlement to displace him in a reduction in force that should have been

completed before the other employee acquired such status. In effect, the Commission concluded that a right to displace this employee became vested in the appellant before the employee attained career status and, consequently, nothing that happened later offered any basis for permitting him to be retained in preference to the appellant.

In keeping with these findings, the Commission's letter of decision recommended that the agency cancel the appellant's separation and that he be restored retroactively. This letter also indicated that unless some suitable reassignment could be offered the other employee or the appellant, the other employee must be demoted or separated, as appropriate, under the provisions of Section 14 of the Veterans Preference Act in order to correct the agency's administrative error made in connection with the appellant's reassignment rights.

In reaching its decision on this appeal, the Commission gave consideration to the findings of the United States Court of Claims in *Joseph J. Kelly v. United States* (138 Fed. Supp. 244, decided January 31, 1956) in a somewhat similar situation. In its opinion, the Court of Claims indicated that:

- the temporary restoration of a successful appellant to his original position (rather than to a continuing position to which the agency had erroneously denied him reassignment rights and to which the Commission had recommended that he be reassigned) was not made in good faith; and,
- as a result, this restoration action could not be used as a basis for nullifying the employee's right to be reassigned to the continuing position.

Although both of these cases involved the restoration of an employee separated by reduction in force, the principle that the restoration of a successful appellant must be a bona fide action has equal applicability to Part 9 and Part 22 cases.

MAKING A POSITION AVAILABLE IN RESTORATION CASES

We appreciate that agencies are faced periodically with the problem of how to make a position available for a successful appellant. To some extent, agencies can avoid or minimize these problems:

- by not officially filling the position of a separated employee whose appeal is pending, or by filling it through detail until the appeal is resolved; or
- by returning the employee to some vacant position equal in grade and pay to that from which he was separated, provided this can be done under the terms of the restoration order.

Obviously, not all potential problems based on restoration orders can be resolved without displacing one or more employees. Those that cannot present special problems of equity, not only with respect to the person being restored but also to those who may have been involved in the chain of replacement actions. These equities vary too widely from case to case to be catalogued or categorized and used as a basis for developing hard-and-fast rules that will lead to the best possible solution in every case. Thus, agencies must work out each such problem on the basis of all the facts and circumstances of the particular case. In doing so, they should keep in mind that an order for restoration of a successful appellant will serve as a basis for completing all reduction in force actions that may be necessary to make a suitable position available for the appellant or, in the alternative, for effecting all personnel actions under Part 9 or Part 22 that may be necessary to make such a position available.

Regardless of the procedures followed, it ordinarily should be sufficient if all employees (including the appellant's replacement) who received position changes as a direct result of the successful appellant's having been taken out of his position are returned to their former posi-

tions. In any event, all employees who are adversely affected will have their customary right of appeal to the Commission, i.e., under Part 9, 20, or 22, as applicable. Agencies should consider the merits of each proposed individual action in the light of the over-all problem and the Commission will do the same thing when adjudicating any appeals resulting from such actions.

EFFECT OF AGENCY DETERMINATIONS MADE AT TIME OF APPOINTMENT

The fact that the Commission does not review the merits of a Part 9 action does not preclude it from determining whether an appellant in fact was given reasons for the action.

This principle formed the basis for the Commission's decision on a recent appeal by an employee separated during the probationary period for reasons which occurred before appointment. The employee's appeal was based on the grounds that all of the derogatory information on which the separation action was based was known to the agency at the time of appointment.

The record indicated that the agency had hired the employee with full knowledge of certain derogatory information about him relating to a previous arrest record. Subsequently, the agency sought to remove him because of this same arrest record. The Commission found the case *procedurally* defective on the grounds that, when an agency advances as the sole reason for separation facts known and accepted by it when the employee was hired and there have been no other changes in circumstances, the agency has not stated a reason for removal within the meaning of the Civil Service Regulations.

Signed WARREN B. IRONS

Warren B. Irons
Executive Director

UNITED STATES CIVIL SERVICE COMMISSION
APPEALS EXAMINING OFFICE
WASHINGTON 25, D. C.

December 4, 1962

APPEAL OF NIMER S. WAHBY
UNDER PART 20 OF THE CIVIL SERVICE REGULATIONS
REDUCTION IN FORCE

INTRODUCTION

The United States District Court for the District of Columbia, by Order dated August 1, 1962, remanded the case of Nimer S. Wahby v. Elvis J. Stahr, Jr., et al, Civil Action No. 2500-59 to the Civil Service Commission for further review.

The case was remanded with specific directions to the Commission to determine the applicability, if any, of the policy contained in Federal Personnel Manual Letter 752-2, dated April 28, 1961 to the circumstances surrounding the reduction in force of Mr. Wahby on November 4, 1958.

Pursuant to the remand, additional evidence and information was accepted from the appellant and the agency and a hearing was held on October 15, 1962.

ANALYSIS AND FINDINGS

The policy enunciated in FPM Letter 752-2 dated April 28, 1961 concerning the restoration of a successful appellant is that the restoration must give the restored employee all of the rights to which he is entitled under the Commission decision on which the restoration action is based.

The facts of the case that formed the basis for the issuance of the FPM Letter 752-2 are as follows:

The appellant in this 752-2 appeal case was a career employee in retention subgroup 1-B. He was reached

for reduction-in-force action in his competitive level and appealed on the grounds that the agency was in error in not reassigning him to a position in another competitive level occupied by a career-conditional employee in retention subgroup II-A. The Commission found the appellant qualified for the other position and, recommended that the appellant be given assignment rights to the position.

In the interim, the retention subgroup II-A employee completed three years of service as a career-conditional appointee and attained career status, with the result that his tenure group became I-A and thus he had acquired higher retention standing than the appellant.

In attempting to comply with the Commission's recommendation, the agency established a new position in the level identical to the new I-A employee's position and restored the appellant to it.

Shortly thereafter the agency abolished one of the two identical positions in the level and separated the appellant by reduction-in-force action. The new I-A employee was retained in the competitive level on the grounds that, as of the effective date of the second reduction in force, he had become a higher retention subgroup employee, i.e., I-A.

The Commission held that the appellant's right to displace this incumbent *when still engaged in the original competition with him* was not to be defeated by the fact that he had acquired a higher standing while appeal was pending.

The facts in Mr. Wahby's case differ materially from the above facts in the case which prompted the issuance of FPM Letter 752-2.

The Commission found in its March 21, 1958 decision on Mr. Wahby's initial appeal that he was qualified for and entitled to assignment to the position occupied by Mr. Harold Peacock inasmuch as Mr. Peacock was a lower retention subgroup employee as of the effective date of Mr. Wahby's reduction-in-force action. *Mr. Peacock's position was in a competitive level separate from the competitive level of the position from which Mr. Wahby was separated.*

In compliance with the Commission's decision and recommendation, the agency on June 26, 1958 cancelled the reduction-in-force action taken in Mr. Wahby's case and reassigned him to the position occupied by Mr. Peacock retroactive to January 17, 1958 the effective date of the reduction-in-force action.

Effective on June 30, 1958, Mr. Peacock was given a detail not to exceed July 30, 1958 *to another position in another competitive level.* On August 1, 1958 Mr. Peacock's detail was extended not to exceed September 30, 1958. Before the expiration of the extended detail, Mr. Peacock was given a permanent reassignment effective September 21, 1958 *to a third position in another competitive level.*

The difference between the restoration action taken in Mr. Wahby's case and the case which prompted the issuance of the policy statement contained in FPM Letter 752-2 is that, in the case referred to in FPM Letter 752-2, the employee whom the appellant was entitled to displace was not displaced but was retained in the same competitive level and the appellant was restored to another position in the same level. In Mr. Wahby's case, he was restored to the position occupied by Mr. Peacock. *Mr. Peacock was displaced by the action and was taken out of the position and reassigned to another position in a separate competitive level where he was no longer in competition with Mr. Wahby for retention in Mr. Wahby's competitive level.*

To recapitulate, in the case referred to in FPM Letter 752-2, the appellant was placed in competition in his competitive level with the employee he was entitled to displace.

In Mr. Wahby's case, however, Mr. Wahby was not placed in competition with Mr. Peacock in the competitive level to which he was restored because *Mr. Peacock was reassigned out of the competitive level to another competitive level*. Under these circumstances, Mr. Peacock's retention on the rolls in a separate competitive level and his later acquisition of career status had no effect on Mr. Wahby's retention rights when Mr. Wahby's position was abolished in the second reduction in force.

At the October 15, 1962 hearing before the Commission, the appellant's attorney pointed to the fact that, when Mr. Wahby was restored to the position occupied by Mr. Peacock effective on June 26, 1958, Mr. Peacock was not reassigned from his position but was detailed temporarily to another position until September 21, 1958 when he was reassigned out of the position. The attorney further points out that a detail does not have the effect of taking an employee out of a position as far as the employee's official position of record is concerned. Under these circumstances, the attorney further pointed out that for the period following Mr. Wahby's restoration on June 26, 1958 until Mr. Peacock was reassigned out of his position of record, both Mr. Wahby and Mr. Peacock occupied the same position. This fact, however, has *no bearing on the issues of this case*. No reduction-in-force action was taken in Mr. Wahby's case during the period between Mr. Wahby's restoration and Mr. Peacock's reassignment. Mr. Wahby was in no way prejudiced by the temporary retention of Mr. Peacock in the competitive level.

In the case referred to in FPM Letter 752-2, the restored employee was prejudiced by the retention of the other employee because both were still in the same competitive

level as of the effective date of the second reduction in force.

Under the Commission's order to restore Mr. Wahby to the position occupied by Mr. Peacock (to which he was restored), Mr. Wahby was not entitled to remain in that position in perpetuity but was entitled to remain only so long as, in the discretion of the agency, that position was necessary to the accomplishment of its mission or until action was taken to assign him to another position. Upon a determination that the position was no longer needed and was to be abolished he was entitled to reduction-in-force procedures and a new determination of his rights as of the effective date of any new reduction-in-force action.

In view of our above analysis we find that the restoration action was a bona fide compliance with the order of the Commission to restore Mr. Wahby and we find that the policy enunciated in FPM Letter 752-2 is not applicable to the fact situation in Mr. Wahby's case.

This decision may be appealed to the Board of Appeals and Review, U. S. Civil Service Commission, Washington 25, D. C., provided such an appeal is filed within seven (7) days after receipt of this decision. If no appeal is filed with the Board of Appeals and Review within the prescribed time limit, the file will be returned to the U. S. District Court for the District of Columbia pursuant to the court's order of August 1, 1962.

S. L. Elliott, Chief
Appeals Examining Office

Decision of Board of Appeals and Review
(June 18, 1963)

Gentlemen:

Reference is made to the case of Nimer S. Wahby, plaintiff v. Elvis J. Stahr, Jr., et al., defendants, (Civil Action

No. 2500-59) which was remanded to the Commission by Order of August 1, 1962, and to the decision of the Commission's Appeals Examining Office (AEO) released on December 4, 1962, from which a further appeal was taken in behalf of Mr. Wahby to the Board of Appeals and Review.

Your representations in support of the further appeal, as well as the representations of the Army Map Service, have been fully considered by the Board in conjunction with the record file received from the District Court and the AEO. The Board concurs in the decision of the AEO that the restoration of Mr. Wahby, as effected on June 26, 1958, was a bona fide compliance with the order of the Commission and in its findings as to material difference between the facts in his case and those cited in FPM Letter 752-2.

The Board, however, concurs in the finding of the Appeals Examining Office that "the policy enunciated in FPM Letter 752-2 is not applicable to the fact situation in Mr. Wahby's case" in the sense that the facts of record in the Wahby case do not warrant any reversal of the Commission's original decision on his appeal because of any conflict between those facts and the principles discussed in FPM Letter 752-2. The phrase used by the Appeals Examining Office, "a policy enunciated in FPM Letter 752-2," may carry the implication that this letter promulgated a new policy and that prior to its issuance on April 28, 1961, the Commission did not require full, effective, or bona fide compliance with its recommendations regarding the restoration of successful appellants. In your brief to the Board, and in other documents in the case, there are frequent references to "the newly promulgated policy contained in FPM Letter 752-2."

The Board of Appeals and Review has always required that its recommendations regarding corrective action in the case of successful appellants be carried out fully, effectively, and completely. In the opinion of the Board, the

Commission could not tolerate or approve any other kind of compliance or establish a policy permitting any other kind of compliance. FPM Letter 752-2 was a reminder or caution to agencies. The introductory sentence reads, "Two recent appeals cases point up two principles which agencies should be aware of." The sense, in the opinion of the Board, is not that agencies are to be made aware of, or informed of, something new, but that they should be alert to, or conscious of, the stated principles in complying with restoration orders.

The Board is of the opinion that allegations regarding the bona fide nature of agency compliance with instructions as to corrective action in a reduction-in-force case have to be considered in the light of the great amount of discretion that agencies have in administering reductions in force, apart from the personnel actions that are taken with respect to individual employees who are reached for action in such reductions. For example, an agency may be told by higher headquarters on January 1 that its allotment of funds has been cut by \$500,000 for the remainder of the fiscal year. The agency may decide to adjust to this cut by immediately separating one hundred employees. On the other hand, as far as the Civil Service Commission's authority is concerned, the agency could decide to wait until April 1 and meet the new fiscal situation by separating two hundred employees. Obviously, some employees would find the first approach more to their liking; others would find that during the delay until April 1, their status had changed favorably to such an extent that they are not within reach for action on April 1, although they would have been within reach on January 1.

It is worth noting also that, when an agency is undergoing successive reductions in force, it sometimes happens that an employee benefits by being reached for action in one of the earlier steps in the reduction.

The Board finds that the Appeals Examining Office has correctly identified the issues in this case and it agrees with its analysis and conclusions. The Board's recommendation to the Army Map Service of June 12, 1958, was that Mr. Wahby should be restored, as of the effective date of his separation, to position No. 4421, or that he be reassigned, as of the date mentioned, to another position of like grade, seniority and tenure for which he was found fully qualified and to which he could be assigned without undue interruption to the work. The Board received from the agency copy of the official notification which it gave to Mr. Wahby of the cancellation of his separation by reduction in force on June 17, 1958, and of his reassignment to job No. 4421. Mr. Wahby did return to active duty with the Army Map Service and continued in that position for approximately five months after his restoration. No claim was made at the time that this restoration had not been properly accomplished. No protest was made regarding the agency's action in retaining Mr. Harold Peacock on other assignments. If the agency had said, "We cannot cancel Mr. Wahby's reduction in force and place him in position No. 4421 because that is occupied by Mr. Peacock, and during the pendency of this appeal Peacock has acquired a higher status than Mr. Wahby," the Board would have had authority and responsibility for telling the agency that Wahby's rights versus Peacock's had to be considered as of the time of Wahby's initial separation and would have reiterated its previous directive. The Board, however, had no authority with respect to what the agency did with Mr. Peacock in taking him out of the job to which Wahby was entitled, unless it had taken an action from which Peacock had a right of appeal or unless Peacock's reassignment required action against another employee who, in turn, had appealed to the Commission. Neither of these actions occurred.

Accordingly, the Board affirms the decision of the Appeals Examining Office of December 4, 1962, and hereby

incorporates the same herein as though set out in full that the restoration of Mr. Wahby was a bona fide compliance with the order of the Commission to restore Mr. Wahby. The Board finds no conflict between the facts in this case and the principles called to the attention of agencies in FPM Letter 752-2.

For the Commissioners:

Sincerely yours,

E. T. GROARK
*Chairman, Board of Appeals
and Review*

Motion For Summary Judgment

Comes now plaintiff, by his attorney of record, and moves for summary judgment for the reason that there is no genuine issue of material fact and plaintiff is entitled to judgment as a matter of law.

Attached hereto and made a part hereof are Statement of Facts Pursuant to Local Rule 9(h) and Points and Authorities in Support of this motion with Exhibits A, B, C and D.

SCOTT & SCOTT
By BYRON N. SCOTT
Byron N. Scott
Attorney for Plaintiff

**Motion To Dismiss Or In the Alternative
For Summary Judgment**

Defendants herein through their attorney, the United States Attorney for the District of Columbia, respectfully move on the basis of pleadings, exhibits, briefs, affidavits, certificates, and memorandum attached, that the complaint herein be dismissed for failure to state a claim upon which

relief can be granted, or in the alternative, move for summary judgment for the reason that no issue of material fact exists and defendants are entitled to judgment as a matter of law.

/s/ DAVID C. ACHESON
David C. Acheson
United States Attorney

/s/ CHARLES T. DUNCAN
Charles T. Duncan, Principal
Assistant United States
Attorney

/s/ JOSEPH M. HANNON
Joseph M. Hannon
Assistant United States
Attorney

/s/ JOHN E. HOGAN
John E. Hogan
Assistant United States
Attorney

Order

This matter having come before the Court on the plaintiff's motion for summary judgment and the defendants' Cyrus R. Vance, et al. motion to dismiss or in the alternative for summary judgment and the matter having come on for hearing and upon consideration of the memoranda and exhibits and other papers on file in this case, the Court having determined that there is no material issue of fact and that the defendants are entitled to summary judgment as a matter of law, it is by the Court this 7th day of November, 1963,

ORDERED that the defendants' alternative motion for summary judgment be and the same is hereby granted and it is

FURTHER ORDERED that the plaintiff's motion for summary judgment be and the same is hereby denied.

JOSEPH C. MCGARRAGHY
Judge

Notice of Appeal

Notice is hereby given this 4th day of December, 1963, that plaintiff, Nimer S. Wahby, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 7th day of November, 1963 in favor of defendants against said plaintiff, Nimer S. Wahby.

BYRON N. SCOTT
Attorney for Plaintiff
925 15th St., N.W.
Washington 5, D. C.

BRIEF FOR APPELLEES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

No. 18,327

FILED MAR 31 1964

NIMER S. WAHBY, APPELLANT

Nathan J. Paulson
CLERK

v.

STEPHEN AILES, ET AL., APPELLEES

Appeal from the United States District Court
for the District of Columbia

DAVID C. ACHESON, *DA*
United States Attorney.

FRANK Q. NEBEKER, *DA*

JUDAH BEST, *LKT DA office*

MARTIN R. HOFFMANN, *DA*
Assistant United States Attorneys.

QUESTION PRESENTED

In the opinion of appellees, the following question is presented:

Where the record shows rational basis for findings by the Civil Service Commission that appellant, earlier accorded *bona fide* restoration to his Army Map Service employment, was later properly reached for separation pursuant to a reduction in force, and all the requirements of law and regulation were met, did the District Court properly rule the Government entitled to summary judgment?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,327

NIMER S. WAHBY, APPELLANT

v.

STEPHEN AILES, ET AL., APPELLEES

**Appeal from the United States District Court
for the District of Columbia**

BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE

Appellant was separated from his Army Map Service employ pursuant to reduction in force (RIF) in December 1958. The Civil Service Commission decided his case adversely to him, and he filed this suit in the District Court on September 8, 1959, seeking review of his removal as well as injunctive restorative relief. Summary judgment was awarded the government in May 1961. He reached this Court on appeal, and remand was ordered in June 1962,¹ that the Civil Service Commission might evaluate the impact of its Federal Personnel Manual

¹ Order dated June 12, 1962.

(FPM) letter 752-2 (dated April 28, 1961) (2d J.A. 33)² on appellant's case. The Commission's decision of the letter's non-applicability in June 1963 and summary judgment for the government in the District Court in November 1963 bring the case again on appeal.

Appellant's discharge in December 1958 was not his first of that year; he earlier had been reached in January 1958 for reduction though he was a career employee. Two other employees, similarly situated, had resigned rather than undergo RIF procedures. The Commission ordered appellant restored to equivalent job 4421, then occupied by one Peacock who was a career-conditional employee and thus lower than appellant on the preference register. Appellant was restored and assigned to 4421 on June 26, 1958, which job he shared with Peacock for four days until Peacock was detailed to other work.³

At the time it was decided Geographic Names Branch would have to forego appellant's original job 4423, it was seen that Peacock's 4421 job in that same Branch too "might ultimately be changed or cancelled." (Gov't. App. 28-29.) Reorganization which included rewriting of two other jobs to absorb some of 4421's responsibilities was later decided upon. Appellant was notified of the abolition of 4421 and his second release pursuant to RIF in November 1958. At this time he himself had been detailed to other work; the record does not indicate that anyone manned 4421. Job 4421 has never been re-established.

² As they appear in this brief, "1st J.A." refers to the joint appendix printed as part of appellant's brief in appellant's first appeal, No. 16,486; "2d J.A." refers to the joint appendix printed in appellant's brief on this appeal; "Gov't. App." refers to the appendix of the government's brief on the first appeal.

³ Peacock's first detail was to 4414 where he prepared a handbook on Norway and acted in a vacationing employee's stead. His re-assignment out of 4421 on September 21, 1958, found him placed in the USSR Section, job 5263, preparing a Cartographic Glossary. He was converted to career appointment on October 10, 1958. From this position he resigned on January 15, 1960.

Regarding this second discharge, on June 2, 1959, the Civil Service Commission found appellant was alone in his competitive level, and that the "agency proposed to separate you from the rolls as a result of the abolishment of your position." (2d J.A. 15.) Noting that appellant was not qualified for offers of other positions in his competitive area, including Geographic Names specialists and translator positions, the Board accordingly found him properly reached for action by RIF (2d J.A. 16).

To his motion for summary judgment filed February 1, 1961, appellant appended *inter alia* his own affidavit. He charged in averment that personal animosity against him had occasioned his relief, and that the RIF was accomplished by "faked duties," "doctored . . . job descriptions" and "rigging" positions of employees with lesser retention rights to the point of "deliberate fraud" so that appellant could not "bump" them and retain employment (2d J.A. 19-23). Appellees' cross-motion for summary judgment was supported by affidavits of the Department, Division and Section chiefs for whom appellant worked and the Civilian Personnel Director of the Army Map Service. All attested the circumstances of lack of work in appellant's position which had occasioned the RIF and appellant's discharge.

On the remand the Appeals Examining Office analyzed the FPM letter which had occasioned this Court's remand, and based on factual differences between it and appellant's case, held it not to apply. The letter dealt with a situation in which an employee, returned to equivalent employment after RIF, retained his right to displace another employee in higher retention subgroup, where the second employee had achieved the higher level during pendency of the first employee's appeal from the RIF discharge, and both remained in the original competition (2d J.A. 28-32). The Commission Board of Appeals and Review upheld the Examiner's analysis, agreeing that at the time of appellant's discharge, Peacock had been long since reassigned and was no longer in competition with appellant

(2d J.A 32, 41). Both examiner and board upheld the *bona fides* of appellant's earlier restoration.

Once again in the District Court on cross-motions for summary judgment, the case was decided favorably to appellees. This appeal ensued.

STATUTES AND REGULATIONS INVOLVED

Statutes

Act of June 27, 1944, 58 Stat. 390, 5 U.S.C. § 860, provides:

The Civil Service Commission is hereby authorized to promulgate appropriate rules and regulations for the administration and enforcement of the provisions of this chapter.

Act of June 27, 1944 58 Stat. 390, 5 U.S.C. § 861, provides:

In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided*, That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: *Provided further*, That preference employees whose efficiency ratings are below "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: *And provided further*, That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the

replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions.

Act of October 28, 1949, 63 Stat. 957, 5 U.S.C. § 1094(c), provides:

(c) The official class titles so established shall be used for personnel, budget, and fiscal purposes, but this requirement shall not prevent the use of organizational or other titles for internal administration, public convenience, law enforcement, or similar purposes.

Act of October 28, 1949, 63 Stat. 958, 5 U.S.C. § 1102(a), provides:

(a) Except as otherwise provided in this subchapter, each department shall place each position under its jurisdiction and to which this chapter applies in its appropriate class and grade in conformance with standards published by the Commission or, if no published standards directly apply, consistently with published standards. A department may, whenever the facts warrant, change any position which it has placed in a class or grade to another class or grade. Such actions of the departments shall be the basis for the payment of compensation and for personnel transactions until changed by certificate of the Commission.

Title 10, United States Code § 3012(e), provides:

(e) The Secretary, as he considers appropriate, may assign, detail, and prescribe the duties of members of the Army and civilian personnel of the Department of the Army.

Regulations

Title 5, C.F.R. § 20.2(a), provides:

(a) "Reduction in force" is the release of an employee from a competitive level by means of separ-

ation from the rolls, furlough for more than thirty (30) days, reassignment involving displacement, or changes to lower grade; when such actions are caused by lack of work, shortage of funds, reorganization, or exercise of regulatory reassignment or reemployment rights. Reduction in force does not apply to termination of temporary appointments, retirement, reassignment to vacancies, relegations in the Postal Field Service, or to adverse actions based upon deficiency in conduct or performance or upon other reasons which will promote the efficiency of the service.

Title 5, C.F.R. § 20.4(c), provides:

(c) *Determination of tenure groups.* For the purpose of determining relative retention preference in reductions in force, competing employees with performance ratings of "Satisfactory" or better shall be classified in tenure groups and subgroups according to tenure of employment and veteran preference. In the competitive service, tenure groups shall be as prescribed in subparagraphs (1), (2), and (3) of this paragraph. In the excepted service, employees shall be arranged in tenure groups I, II, or III to correspond with the grouping of employees having similar tenure in competitive positions: *Provided*, That employees who complete one year of current continuous service under temporary appointment shall be in tenure group III.

(1) *Group I.* This group consists of career employees who have completed probation and who are not indefinite because they occupy obligated positions. Career employees serving under temporary or indefinite promotions shall be considered in this group with respect to positions at and below the grade in which they last served on a permanent basis.

(2) *Group II.* This group includes career employees who are serving probationary periods, all career-conditional employees, and career employees who are indefinite because they occupy obligated positions.

(3) *Group III.* This group includes indefinite employees, employees serving under temporary appointments pending establishment of registers, and employees serving under other nonstatus nontemporary appointments.

(4) *Subgroups.* Within each tenure group, employees entitled to veteran preference are in subgroup "A" and others are in subgroup "B".

(i) Employees in subgroup "A" of tenure Group I or II who are entitled to be retained for one year after exercising their restoration rights under section 9 of the Universal Military Training and Service Act of 1951, as amended, shall be given priority in retention over other employees in subgroup "A" until the expiration of the one-year period.

(ii) Employees in subgroup "B" of tenure group I or II with a retention right for one year after restoration under section 9 of the Universal Military Training and Service Act of 1951, as amended, or for six months after restoration under subsection 262(f) of the Reserve Forces Act of 1955, shall be given priority in retention over other employees in subgroup "B" until the expiration of the retention period.

Title 5, C.F.R. § 20.5(f) (2) provides in part:

(2) *Temporary retention.* An employee reached for reduction in force may be retained temporarily in his competitive level for ninety (90) days or less after the effective date of reduction in force actions for higher-ranking employees in the same competitive level in order to continue an essential activity without undue interruption or to satisfy a Governmental obligation to the retained employee. * * *

SUMMARY OF ARGUMENT

The Commission's findings that the reorganization which occasioned appellant's second discharge had ample basis in the facts of record. There was clear proof that the dwindling and shifting workload had resulted in lack of work in positions for which appellant was qualified.

Such factual determinations by the Commission may be overturned only if arbitrary and capricious.

The requirements of the law were met in appellant's discharge in December 1958. The FPM letter which had occasioned earlier remand by this Court was correctly ruled inapplicable. In the absence of prejudice to the appellant by the retention of employee Peacock, appellant may not base his claim on Peacock's being retained instead of himself.

ARGUMENT

The trial court correctly found the reduction in force and resulting termination of appellant's government employment proper both in fact and in law

Title 5, C.F.R. § 20.2(a) provides for reduction in force action occasioned by "lack of work, shortage of funds, reorganization, or exercise of regulatory reassignment or reemployment rights." In notifying appellant of his impending discharge pursuant to a reduction in force, the reason given was "insufficient workload" to justify the number of positions in appellant's section, resulting in necessity to reassign the responsibilities of his position between two other jobs (1st J.A. 33). Faulting the *bona fides* of the dismissal, appellant urges that reinstatement after his first discharge had never been properly accomplished. He contends there was no dearth of work in the section to require the second reduction in force, and that retention of another employee of inferior retention status created the surplus of personnel.

The scope of judicial review of action by administrative agencies is limited to assay of the record to see if rational basis for the agencies' conclusions is evident and assurance that requirements of the law are met. *Eustace v. Day*, 114 U.S. App. D.C. 242, 314 F.2d 247 (1962); *Adams v. Humphrey*, 98 U.S. App. D.C. 40, 232 F.2d 40 (1955). This scope does not extend to review of the wisdom of judgment of a supervisory official as he exercises his discretion in conducting the public business with-

in his area of responsibility. *Hofflund v. Seaton*, 105 U.S. App. D.C. 171, 265 F.2d 363, *cert. denied*, 361 U.S. 837 (1959); *Wagner v. Higley*, 98 U.S. App. D.C. 291, 235 F.2d 518 (1956); *Powell v. Brannan*, 91 U.S. App. D.C. 16, 196 F.2d 871 (1952). This Court has stated it will not review the actions of executive officials in dismissing executive employees except to insure compliance with statutory requirements, and will not reverse the action where is shown "[n]o substantial departure from applicable procedures, no misconstruction of governing legislation, nor any like error going to the heart of the administrative determination." *Saggau v. Young*, 100 U.S. App. D.C. 3, 4, 240 F.2d 865, 866 (1956), quoting *Boylan v. Quarles*, 98 U.S. App. D.C. 337, 338-339, 235 F.2d 834, 835-836 (1956).

a. Rational basis for the Commission's findings

The record is replete with rational basis for the Commission's factual finding that the reorganization was due to lack of work. It is noteworthy that in overruling appellant's initial discharge, the Commission did not find lack of basis for elimination of Job 4423, but found appellant suited for Peacock's Job 4421. The strength of the section embodying both jobs shrank between June 1954 and March 1961 from twenty-five to nine (Gov't App. 26, 31). Additional reduction of personnel was still impending due to the eventual extinction of the Geographic Names Branch in a contemplated reorganization of the Department of Technical Services (Gov't App. 28). Moreover, the monthly work status reports for the times of appellant's first separation, reinstatement and final discharge indicate few maps were actually processed by the Middle East Africa Section of the Geographic Names Branch (Def. Ex. No. 31). The statements of appellant's supervisors add to this rational basis for appellant's ouster (Gov't App. 22-32).

Appellant's suggestions that work to be done in his old section prompted Peacock's "return to his old job" (Br. 7) are without support in the record. Peacock said only

that he returned in March 1959 to "his old section" to do some work, "one or two jobs." (2d J.A. 27.) These later requirements in his old section were forecast in the notice of appellant's termination which indicated some of the responsibility of his eliminated Job 4421 would be shifted to 5263, the job to which Peacock eventually was reassigned.

Appellant cannot seriously contend that the decision of the Board of Appeals and Review "ignored the question of good faith." (Br. 11.) He notes the decision of the Appeals Examining Officer had concluded "'restoration action was a bona fide compliance with the order of the Commission.'" (Br. 11.) The Board incorporated the Examiner's decision and opinion "as though set out in full that the restoration of Mr. Wahby was a bona fide compliance with the order of the Commission to restore Mr. Wahby." (2d J.A. 41.) In this determination of factual merits, it cannot be said that the executive determination was "arbitrary and capricious," *Dew v. Halaby*, 115 U.S. App. D.C. 171, 317 F.2d 582 (1963), and that the District Court erred in not so finding.

b. Requirements of the law were met

In arguing that the legal requirements in the government actions to remove him were not met, appellant urges that the FPM letter was not complied with, and advances the rule in *Ritter v. Strauss*, 104 U.S. App. D.C. 301, 261 F.2d 767 (1958), as controlling the case. The thrust of this line of argument is that—as a matter of law—Peacock's relief was a necessary element of *bona fide* restoration.

The law is inapposite to this suggestion. The initial distinction in the instant case is that the job held by Peacock, 4421, was not of the one-of-a-kind variety treated in the FPM letter, nor was it established as a single position for which appellant and Peacock must vie as in *Ritter, supra*. See also *Kelly v. United States*, 138 F. Supp. 244 (Ct. Cl. 1956). Thus the character of the

job in question here at the time of appellant's restoration did not demand Peacock's relief. In Department of Army parlance, a "job" includes several "positions" unless expressly limited as a "one-position job." Department of Army Civilian Personnel Regulations, 2.2d. And indeed—as the Board noted—appellant at no time until his relief challenged his 90-day co-tenancy with Peacock in the job.⁴

The *Ritter* case, *supra*, and the FPM letter are further inapplicable here in the matter of the reasons for the RIF which resulted in the second discharge. In *Ritter*, the surplusage of manpower was directly caused by the contemporaneous rehiring of another employee; the FPM letter noted the creation of a new job for the returning appellant, which job was then shortly thereafter eliminated in the questioned RIF. Here, however, Peacock had long since been assigned to another job to meet demands of workload, a job for which appellant was not qualified⁵ and into which he was not eligible to "bump".⁶ Factual determinations of necessity to reassign, and delineations, of competitive level are matters peculiarly within the province of executive evaluation and decision, into the merits of which the courts will not delve. *Hofflund v. Seaton, supra*; *Powell v. Brannan, supra*. Legally, as the FPM letter points out, any vested

⁴ Alternatively, as suggested below and on the previous appeal, assuming *arguendo* that 4421 was a one-of-a-kind position, Peacock could have been validly retained under 5 C.F.R. 20.5(f)(2) for 90 days in performance of essential work. Failure to notify appellant of the reasons for this retention as the regulations require would not "go to the heart of the administrative determination" here. See *Powell v. Brannan, supra*. For even now appellant does not claim he was able to do the detailed work. Nor does he assert either that the tasks of detail were non-essential or that there was not work for him in 4421 during the period.

⁵ Appellant spoke no Russian (2d J.A. 24), which was a prerequisite for Peacock's terminal assignment, Job 5263 (Gov't App. 33).

⁶ Job 5263 was in a different competitive level, as the Board noted (2d J.A. 36).

right to "bump" Peacock arising out of appellant's first discharge and accruing at his restoration expired upon Peacock's reassignment. Further, it is implicit in the letter that offer to the successful appellant or to the "other employee" in question of "suitable" reassignment is preferable—where possible—to demotion or separation of the other employee, in this case Peacock. No more than suitable reassignment here occurred.

In short, the legal requirements of appellant's separation were analyzed and evaluated by the Examiner and the Board, and the action taken was properly sustained. Peacock's retention having deprived appellant of no right, he has no grounds to complain thereof. *Bortin v. United States*, 138 F. Supp. 251 (Ct. Cl. 1956). In absence of irregularity and error, the Board's decision must stand, as the District Court correctly ruled in award of summary judgment.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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